

2005 ENVIRONMENTAL NEGOTIATIONS COMPETITION

CONFIDENTIAL INSTRUCTIONS FOR GREGORY/MUJERA BLANCA

ROUND 1 (You are the attorney representing Gregory/Magnani/Mujera Blanca in negotiations)

Gregory is an ornery old guy, but he's a realist. He knows that as a legal matter the DA has a strong case. The DA can substantiate the alleged violations. As a practical matter, however, Gregory has some leverage. It is unclear how penalties will be calculated for various violations, including the cutting of the trees. If a per tree penalty is assessed, or if there is a penalty for each day Mujera Blanca left sediment piles in the open, the penalty could be substantial. It is also unclear whether the court will limit restitutionary awards and disgorgement, following *Kraus* and *Korea Supply*, where the DA, rather than a private party, is the plaintiff.

Items 1 and 3. Creek, Wetlands, and Forest Restoration and Penalty/Disgorgement.

Total Settlement Amount: Gregory has made the decision to get on with his business and get this behind him. He has set aside \$11 million to take care of all of the DA's claims for costs, fees, penalties and restoration. Your fee will probably increase if you can resolve it for less. Gregory will pay no more than \$1 million in penalties. Any additional amount should be for restoration projects. The more holes you, as his lawyer, can put in the DA's ability to recover penalties and restitution under the law, the more leverage you have. Gregory wants some concessions, and he will pay a bit more to get them.

Restoration: a) Gregory knows that the almost completed wetlands project must be completed. He will agree to restore another 2 acres, and possibly more. The 2 additional acres can be restored in two different places adjacent to the on-going restoration (north and south) and the restoration could be as much as 5 acres in either area. Gregory has a strong preference for one of the two areas (the northern, as opposed to southern, area) because he has some plans for future development on the other area. Gregory's preferred area is somewhat less beneficial from a biological perspective. The 2 acre restoration is worth, according to Gregory's consultant, about \$1.5 million. Gregory can agree to additional restoration work, within the overall limits of the \$11 million or less total.

b) Gregory will agree to fund the US Forest Service's re-planting work for at least 2000 trees, which is worth \$500,000 per 1000 trees. Gregory does not want any of the reforestation to take place on the ski resort. You should ensure that the DA will not insist on reforestation on the resort. You can increase the number of trees that Gregory will fund within the overall limits of the deal.

c) Gregory will install sediment controls for 2 miles of the creek (the area arguably impacted by the ski resort's actions), at a consultant-estimated cost of \$750,000 per mile or so. You can increase the restoration area within the monetary limits of the total settlement. Sediment controls could be installed for as much as ten miles of the creek.

2. Monitoring and Compliance

This is the tougher issue. Gregory knows that the DA wants funding for an inspector,

liquidated damages for specific permit violations, and a statement of compliance under penalty of perjury.

a) Gregory does not want to make the county's job easier, so he will not fund a position directly.

b) Gregory will agree to a scheme of liquidated damages for certain permit violations, up to \$5000 per violation, as long as the list of violations for which penalties are available is severely limited.

c) Gregory will sign a compliance statement under penalty of perjury annually, but wants to keep Magnani out of it if at all possible.

You might consider increasing the dollar amount of the settlement to get concessions on monitoring and compliance.

The DA will make the opening proposal.

